

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JOHNNIE N. PERRY,
Appellant,

DOCKET NUMBER
AT-0831-17-0520-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: May 31, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Johnnie N. Perry, Jacksonville, Florida, pro se.

Jane Bancroft, Washington, D.C., for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which affirmed the final decision of the Office of Personnel Management finding that he had received a refund of his retirement contributions to the Civil Service Retirement System following his removal from Federal service in 1991.

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

¶2 On review, the appellant submits three nearly identical petitions. Petition for Review (PFR) File, Tabs 1, 3, 5. He does not contest any specific finding by the administrative judge concerning the record evidence or telephonic hearing² testimony. Although the appellant's petitions for review are difficult to decipher, he appears to raise a discrimination claim regarding his 1991 removal for the first time on review. PFR File, Tab 1 at 1, Tab 3 at 2. The appellant submits a 1994 memorandum regarding alleged discrimination by the Department of the Navy in his removal. PFR File, Tab 1 at 2, Tab 3 at 5, Tab 5 at 4. He also submits his February 1991 application for the refund of his retirement deductions, a copy of which the agency submitted into the record below. PFR File, Tab 3 at 3, Tab 5

² A telephonic hearing in this appeal was held on July 20, 2017, but we are unable to locate the recording of the hearing. Because the appellant does not contend that the administrative judge's characterization of his testimony differed from that which he presented at the hearing, we find that the regrettable unavailability of the recording has not prejudiced the appellant's substantive rights, and a rehearing is therefore unnecessary. *See Harp v. Department of the Army*, [791 F.2d 161](#), 163 (Fed. Cir. 1986).

at 2. The appellant states generally in each of his petitions that the initial decision contained erroneous findings of material fact, but he provides no additional argument or explanation of the findings to which he refers. PFR File, Tab 1 at 1, Tab 3 at 2, Tab 5 at 1. Finally, the appellant makes a general argument regarding “new weight” without any explanation. PFR File, Tab 5 at 1.

¶3 The Board generally will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party’s due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980); [5 C.F.R. § 1201.115\(d\)](#). To constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989). The appellant has not made such a showing regarding the allegations of discrimination he raises for the first time on review. The evidence concerning his 1991 removal is not new, as it predates his Board appeal and the close of the record below by more than 25 years. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980) (stating that, under [5 C.F.R. § 1201.115](#), the Board generally will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party’s due diligence). In any event, the appellant’s new arguments are not relevant to the issue in the present appeal.³

¶4 The appellant’s remaining general arguments and documents provide no basis for overturning the administrative judge’s well-reasoned finding that he failed to meet his burden of proving by preponderant evidence his entitlement to

³ The administrative judge clearly informed the parties during a prehearing conference that the only issue that would be considered in the appeal was the appellant’s eligibility for a retirement annuity unless the parties made a request in writing to modify the issues. Initial Appeal File, Tab 6 at 1. The appellant filed no such request.

the retirement benefits he seeks. Initial Appeal File, Tab 10, Initial Decision at 4; *see Fox v. Office of Personnel Management*, [50 M.S.P.R. 602](#), 605 (1991); [5 C.F.R. § 1201.56\(b\)\(2\)\(ii\)](#).

NOTICE OF APPEAL RIGHTS⁴

You may obtain review of this final decision. [5 U.S.C. § 7703\(a\)\(1\)](#). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. [5 U.S.C. § 7703\(b\)](#). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#).

⁴ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. [5 U.S.C. § 7703\(b\)\(2\)](#); *see Perry v. Merit Systems Protection Board*, [582 U.S. 420](#) (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on

race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. [5 U.S.C. § 7702\(b\)\(1\)](#). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after you receive** this decision. [5 U.S.C. § 7702\(b\)\(1\)](#). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days after your representative receives** this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#) or

other protected activities listed in [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(i\), \(B\), \(C\), or \(D\)](#). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁵ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#).

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Washington, D.C. 20439

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⁵ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

/s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.